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IN THE

Supreme Court of the United States

October Term, 1963
No. 778

FEDERAL EMPLOYEES DISTRIBUTING COMPANY, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER.

The judgment of the Court of Appeals was entered on September 16, 1963. Rehearing was denied on October 24, 1963. The petition for writ of certiorari was filed on January 22, 1964. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

Petitioner's basic premise is unchallenged by respondent: two thousand United States Post Office employees each paid $2.00 to form petitioner corporation in 1949. This was and is petitioner's capital. The ownership rights of the members of petitioner corporation arose solely out of each member's payment.

Respondent has not questioned the fact that these membership funds constitute petitioner's original and only capital.[1] It is these capital funds upon which respondent seeks to impose an income tax.

Petitioner would lay emphasis on respondent's failure to respond to petitioner's point that the membership funds were its capital (Pet. 8-10), that petitioner had no capital other than the amounts received upon the issuance of its memberships, and that the imposition of an income tax on such capital funds is violative of the Constitution of the United States.[2] It is petitioner's position that Congress did not intend that an income tax should be levied against a corporation's only source of capital; but that if Congress did intend to impose an income tax on such a capital transaction, the same would be unconstitutional under the provisions of Article I, Sections 2(3) and 9(4) of the Constitution of the United States.

The constitutional argument was urged by petitioner in the trial court (Pet. App. 17-18). It was raised below in the Court of Appeals in petitioner's briefs, in oral argument and on a petition for rehearing, but was ignored by the Court of Appeals. The constitu-

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[1] In the Pre-trial Conference Order [R. 24, 25], Respondent conceded that "there has been no other capital funds available to Plaintiff (petitioner)", but denied that the membership certificate fees were paid-in capital, equity capital or capital.

[2] In its petition, petitioner urges that the consideration by the Court of Appeals of a Law Review article directed to the very issues and case before that court was erroneous and prejudicial to the rights of petitioner (Pet. 16-19). Petitioner also urges that the reliance by the Court of Appeals on subjective intent and motive under Section 1032 of the Internal Revenue Code was erroneous (Pet. 13-15). In its brief in opposition, respondent also failed to answer either of these arguments of petitioner.

tional argument is wholly separate and distinct from the question of petitioner's memberships constituting stock under Section 1032 of the Internal Revenue Code. Consideration of this constitutional issue by the Court of Appeals was essential to a proper disposition of the case.[3] The Court of Appeals thus had a duty to consider and to expressly accept or reject the constitutional issue raised by petitioner in the proceedings below. For this reason, this and the companion case, *Affiliated Government Employees Distributing Company v. Commissioner of Internal Revenue*, No. 777, should be remanded to the Court of Appeals for consideration of the constitutional issue raised by petitioner in the proceedings below. *Barr v. Matteo*, 355 U. S. 171 (1957).

Conclusion.

For the reasons set forth in the petition for writ of certiorari and petitioner's reply brief herein, the petition for certiorari should be granted, and this matter should be heard on the merits or, in the alternative, remanded to the Court of Appeals for the Ninth Circuit for proper consideration of the constitutional issue duly raised by petitioner.

Respectfully submitted,

EDWARD L. BUTTERWORTH,
Counsel for Petitioner.

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[3]The United States District Court below acknowledged the constitutional question (Pet. App. 17-18). However, it held in favor of petitioner on the ground that petitioner's memberships constituted stock, and thus the amounts received in return therefor were excludible from gross income under Section 1032 of the Internal Revenue Code. Hence, a decision on the constitutional issue was not required.